FOR ARGUMENT

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1276

DORTHA ALLEN GUY,

Petitioner,

—v.—

ROBBINS & MYERS, INC.

REPLY BRIEF FOR PETITIONER

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I.

The Limitations Period Commenced to Run on November 18, 1971.

Until November 18, 1971, when the Personnel Director of the Company, Mr. Krogh, denied Petitioner Guy's appeal through the grievance procedure, the discharge of Mrs. Guy was not a final act which triggered the running of the limitations period for filing a charge with the EEOC. (Guy Brief 7-12). The October 25, 1971, initial decision to discharge Guy did not end the employer-employee contractual relationship between the petitioner and the Company. That relationship was not ended until the completion of the grievance procedure provided by Article XVIII of the collective bargaining agreement. (35a-38a).

Robbins & Myers admits that Mrs. Guy had a "right to appeal" the initial discharge decision since that decision was not final and did not terminate the contractual relationship. (Robbins & Myers Brief 32). The Company maintains that since it "implemented" that decision, i.e., removed Mrs. Guy from her job, an EEOC charge may be filed contesting that decision. The Petitioner does not disagree with the Company that the decision to discharge, whether implemented or not, like an anticipatory breach of a contract, is an act which may permit the filing of an EEOC charge. However, the Company further argues that whenever an employment decision is tentatively implemented, even though it is subject to internal Company review and may later be reversed in its entirety, that tentative implementation triggers the running of the limitations period requiring a worker to file a charge within 90 days.

This argument does not make sense. Only when the Company's act is no longer subject to a formal review as provided by the contract does it become so final as to trigger the running of the limitations period. Until then the Company may reverse its initial decision and purge its implementation of discriminatory consequences; for example, it might have done so here by reinstating Mrs. Guy with backpay. Under the Company's "date of implementation" formula, an employee would be compelled to file an EEOC charge whenever he was temporarily denied assignment, training, or other opportunity or otherwise mistreated by his immediate supervisor for what he perceived to be racial reasons. It would be necessary to file an EEOC charge even though the worker may in all likelihood obtain a remedy by filing a grievance or otherwise appealing the decision through the grievance machinery to the supervisor or personnel manager.

Until an internal appeal or grievance procedure is exhausted, a Company should not be presumed to have conclusively discriminated by the act of one of its foremen, agents or managers; rather the procedure provided by a contract for review of initial employment decision should be allowed to run its course without forcing employees to resort to Title VII procedures which are collateral to, and may well interfere with, the internal procedures of the Company. This rule conforms with the expectations of workers—the grievance procedure is a system that is routinely invoked and which often results in a Company's reversal of an initial decision. It is also consistent with Title VII's emphasis on private conciliation and voluntary compliance. *Moore* v. *Sunbeam Corporation*, 459 F.2d 811, 827 (7th Cir. 1972).

II.

The Filing of a Grievance Tolled the Running of the Limitations Period.

Robbins & Myers simplistically asserts that the "plain meaning" of the limitations period—a charge "shall be filed within ninety days after the alleged unlawful employment practices occurred"—is susceptible to only one interpretation: that the charge must be filed within the ninety-day period and that tolling or other equitable doctrines are not applicable (Robbins & Myers Brief 9). Robbins & Myers thereby concludes that the time limitation must be strictly imposed by the courts without regard to the legislative scheme or to particular factual circumstances.[1] This Court has rejected the argument that the

[1] The Company's argument by analogy to the line of cases which hold that the time for filing an action asserting a claim

enforcement of limitations periods in federal statutes should be governed by mere semantic conclusion; rather, the Court has held that federal statutes of limitations may be subject to tolling or other equitable doctrines in appropriate circumstances as dictated by the purposes of the legislative schemes. *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 426-27 (1965); *Midstate Horticultural Co.* v. *Pennsylvania R.R.*, 320 U.S. 356, 360 (1943).[2] When the limitations period is examined in the light of the Congressional policies established by Title VII, it is clear that the period was tolled by Mrs. Guy's resort to the grievance procedure.[3]

Robbins & Myers, in a last-line defense of the lower courts' opinion, makes factual allegations not raised in the lower courts and which are without any support in the Record: that Guy slept on her rights and/or that the Company was prejudiced by the "delay" in the filing of the claim. These are concerns to which limitation periods are normally directed. *Burnett* v. *New York Cent. R.R., supra,*

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against the United States is not tolled by resort to administrative procedures misses the point. (Robbins & Myers Brief 13-16). These cases are governed by the well-established principle "that limitations and conditions upon which the Government consents to be sued must be strictly observed and exception thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).

[2] It is important to note that the limitations periods interpreted in *Burnett* ("No action shall be maintained . . . unless commenced within three years. . . .") and *Midstate Horticultural Co.* ("all actions . . . shall be begun within three years . . . and not thereafter") were as authoritative as §706(e) of Title VII. The language in §706(e) merely reflects the common standard used by the Congress to denote a limitation period and does not, by itself, indicate when, or if, tolling is appropriate.

[3] See Guy Brief 17-22; IUE Brief 29-35; U.S. Amicus Brief 26-30; *Laffey* v. *Northwest Airlines, Inc.*, No. 74-179, Slip Opinion 85-9 (D.C. Cir., Oct. 20, 1976).

380 U.S. at 428; *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538, 554-55 (1974). The Company argued below, and the lower courts held, that, as a matter of law, the filing of a grievance does not toll the limitations period. These new factual allegations, on which the record is silent and which were neither argued nor relied on below, are not now before this Court. Moreover, it is difficult to imagine how the Company was prejudiced by the fact that Guy filed a charge 108 days rather than 90 days after being informed of her discharge, especially when the Company was informed within two days of its initial decision that Guy was protesting the discharge. Similarly, the Company's assertion that Guy "has slept on her rights" is without foundation.[4] In any case, the burden rests upon the defendant to demonstrate that the tolling of the statute would in this particular situation work an injustice. *Cf. Love* v. *Pullman Co.,* 404 U.S. 522, 526 (1972); *Albemarle Paper Company* v. *Moody,* 422 U.S. 405, 424-25 (1975). Robbins & Myers has not, and could it, possibly demonstrate that it was prejudiced by Guy's filing her charge on February 10, 1972 rather than on January 22, 1972.

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[4] For example, the Company asserts that Guy, after receiving her right to sue letter, "failed to act until the last day of the ninety-day period." (Robbins & Myers Brief 23, n. 21). But the Company neglects to mention that from November 20, 1973 (when she received the right to sue letter) through February 18, 1974, she sought but could not find legal assistance. Having failed to obtain private representation, Guy went to the district court and requested appointment of counsel. The clerk of the district court referred her to the Shelby County Legal Services office; that office undertook to represent the Petitioner. (IUE Pet. 17a).

III.

The 1972 Amendment to Title VII Applies.

The legislative history of the Equal Employment Opportunity Act of 1972 makes clear that the time limitations contained in amended section 706 apply to charges filed prior to March 24, 1972. Robbins & Myers ingeniously argues that the straightforward statement in Section 14—that the 1972 amendments "shall be applicable with respect to charges pending [on March 24]"—means other than it plainly states. (Robbins & Myers Brief 39-40).

The Company's interpretation is based solely on the fact that Senator Javits, who introduced the amendment which resulted in the final form of Section 14,[5] stated that he offered the amendment because the Department of Justice requested it. 118 Cong. Rec. 4816 (1972). The Company infers that because the Justice Department's letter[6] referred to the "new enforcement authority" (the grant of authority to EEOC to institute court actions), Section 14, although sweeping in its terms, provides that only the amendment of §706 establishing the enforcement

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[5] Section 14 (initially numbered as Section 13 of S. 2515) originally read: "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall *not* be applicable to charges filed with the Commission prior to the enactment of this Act." (Emphasis added.) Senator Javits' amendment provided that from the word "not" to the end of the section be deleted, and that the following would be inserted: "be applicable with respect to the charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter." 118 Cong Rec. 4816 (1972).

[6] The letter dated February 14, 1973, and signed by David L. Norman, Assistant Attorney General, Civil Rights Division, is attached as a Supplemental Appendix to the "Brief *Amicus Curiae* of the Equal Employment Advisory Council".

authority of EEOC applies to "pending charges". This constricted interpretation is simply refuted by Senator Javits' other statements,[7] the status of the legislation at the time of the amendment,[8] and subsequent legislative history.[9]

Robbins & Myers further argues that the 1972 amendments may not be applied to Guy's charge because it was not "pending" as of March 24, the effective date of the 1972 Act. (Robbins & Myers Brief 40). This argument

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[7] Senator Javits stated that the amendment "would make whatever we do enact into law applicable to pending cases", 118 Cong. Rec. 4168 (1972); see also n. 9, *infra*.

[8] The letter sent by the Justice Department argued against the "cease and desist" authority proposed by S. 2515 for the EEOC and for a grant of authority to the EEOC to bring judicial proceedings. When Senator Javits proposed the amendment to Section 14, the Senate had in fact chosen the approach recommended by the Department of Justice. The Senate had originally intended that the cease and desist authority would *not* apply to pending charges, but that the other amendments to Section 706 (such as the expansion of the period for filing a charge from 90 to 180 days) "would cover existing charges". S. Rep. 92-415, 92d Cong., 1st Sess. 46 (1971); see also U.S. Amicus Brief 12-15. The amendment was simply intended to make the applicability of the EEOC enforcement powers consistent with other amendments to §706.

[9] The Section-by-Section analysis of the bill as reported from the Conference Committee, which was prepared by Senators Williams and Javits and considered by both houses just prior to their voting, stated "that the amended provisions of Section 706 would apply to charges filed with the Commission prior to the effective date of this Act", 118 Cong. Rec. 7169, 7567 (1972), and that the limitation period should be construed "so as to give the aggrieved person the maximum benefit of the law." (*Id.* at 7167, 7565). In view of this legislative history, there can be little question that the inclusive language of Section 14 was intended by Congress to apply, as it so states, the "amendments . . . to Section 706 [including the expansion of the 90-day limit to 180 days] . . . to charges pending with the Commission." Cf. *Davis* v. *Valley Distributing Co.*, 522 F.2d 827, 831 (9th Cir. 1976) pet. for cert. pending in No. 75-836; Guy Pet. 20a-21a.

fails on the facts; not only was the charge pending on March 24, it was investigated months later and a Determination was rendered twenty months after the effective date of the Act.[10] (IUE Pet. 17a-18a). This is not a case where the petitioner seeks to revive a claim on which a decision has been rendered and for which no timely appeal could be taken; rather, the complaint was filed approximately two years after the effective date of the 1972 amendments, and decisions in the district court and appellate court were rendered 27 and 43 months after these amendments became law. Assuredly, this is a case to which the doctrine that "a court is to apply the law in effect at the time it renders its decision" pertains. *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974).

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[10] The Company remarks that Guy listed January 29, 1972 as the most recent date on which the discrimination occurred on her EEOC charge. The Company correctly states that the Record does not state what discriminatory act she is referring to, but incorrectly asserts that EEOC "undoubtedly would not have accepted her charge as timely [if Guy had listed the chronology of the events surrounding her discharge]." Since it was the policy of the EEOC to toll the running of the 90-day limitations period during the pendency of the grievance procedures, Guy Brief 25, n. 41, the EEOC undoubtedly would have processed Guy's charge; in fact EEOC investigated the charge and did not dismiss it as untimely filed but rather rendered a decision on the merits of the claim.

IV.

The Questions Presented Are Properly Before the Court.

Finally, the Company asserts that the issues concerning when the 90-day period begins to run (whether from the Company's initial notification of Guy that she was discharged on October 25, or from the denial of her grievance on November 18) and concerning the applicability of the 1972 amendments are not before the Court because they were not presented to the lower courts.[11] Initially, the Court should note that the pertinent factual allegations are not in dispute and were presented to both the district court and the appellate court;[12] this is not a case where the petitioners are trying to present a novel argument based on facts not brought to the attention of the lower courts. Cf. *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 320-21 (1965).

The issue as to the applicability of the 1972 amendment was fully presented to the Sixth Circuit.[13] Petitioner Guy

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[11] Robbins & Myers also asserts that Rule 40, Rules of the Supreme Court of the United States, bars the presentation of the former issue. This is incorrect; Guy directly raised this issue in her Petition for a Writ of Certiorari 2, 9-10.

[12] 6a-7a (Complaint); 16a-17a (Memorandum of Facts); 25a-26a (Answer). The lower courts relied on the undisputed facts concerning the filing, processing and denial of the grievance, Guy Pet. 1a-2a; 13a.

[13] The argument was briefed in the Sixth Circuit by the EEOC. When an amicus, and especially the federal government, raises an argument in support of the position of a party, the Court certainly has the power to consider the argument. Cf. *Blonder-Tongue Labs, Inc.* v. *University of Illinois Foundation*, 402 U.S. 373, 319 n. 6 (1971). Moreover, Petitioner Guy adopted the argument of amicus in her brief filed with the Sixth Circuit. Brief for Plaintiff-Appellant Dortha Allen Guy 23.

also raised the finality issue in the Sixth Circuit by quoting as follows from *Moore* v. *Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972), the case primarily relied on here:

> . . . although the incident actually 'occurred' on October 24, 1966, for limitation purpose the 'occurrence' was not completed until Moore exhausted his promptly initiated contractual remedies. We therefore hold that with respect to the October 24, 1966 incident the statute began to run on February 16, 1967. 459 F.2d 811, 827. Brief for Plaintiff-Appellant Dortha Allen Guy 16.

The respondent's argument is not so much that the issues were not raised below but that petitioner has better articulated these arguments here.

Furthermore, this Court has not in the past refused to decide legal questions on which certiorari has been granted but which had not been fully briefed below. *Blonder-Tongue Labs.* v. *University of Illinois Foundation*, 402 U.S. 313, 319 n. 6 (971). *A fortiori*, when these arguments concern jurisdictional issues, which the Court has the responsibility to consider whether or not raised below, they may appropriately be presented by the parties to the Court. Cf. *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 209 (1963); *Liberty Mutual Insurance Co.* v. *Wetzel*, 423 U.S. 816 (1976). The Court has treated complaints as incorporating necessary factual allegations when those facts were present although defectively pled.[14] *Matthews* v. *Diaz*, 48 L.Ed. 2d 478, 487, n. 9 (1976); *Schlesinger* v. *Councilman*, 420 U.S. 738, 744, n. 9 (1975). Here the pertinent facts were presented to the lower courts and the jurisdictional basis, Title VII as amended, was properly alleged; thus

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[14] "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. §1653.

theories supplementing those presented in the lower courts in support of jurisdiction may and should be considered here.

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